

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

JESUS L. GUERRERO-ZAZUETA,
Defendant.

Nos. CR-05-0205-FVS-3
CV-07-0135-FVS
CV-07-0402-FVS

ORDER DENYING PETITIONER'S
SECTION 2255 MOTIONS

THIS MATTER comes before the Court based upon Mr. Guerrero-Zazueta's ("Petitioner's") motion for a reduction of his sentence pursuant to 28 U.S.C. § 2255. (Ct. Rec. 249 & 256). He is proceeding pro se.

BACKGROUND

Judgment was entered on August 1, 2006. (Ct. Rec. 184). Petitioner did not appeal. On April 30, 2007, he filed a motion requesting a two-level downward departure on the ground that, as an illegal alien, he will not be eligible for privileges that otherwise would be available to him while he is imprisoned. (Ct. Rec. 249). A second Section 2255 motion, filed by Petitioner on December 17, 2007, raises the same issue. (Ct. Rec. 256). Petitioner argues that he is entitled to a sentence reduction because his ineligibility for various Bureau of Prison ("BOP") programs violates his rights under the Equal Protection Clause, Due Process Clause, and Equal Rights Act of 1964.

RULING

Petitioner's motions shall be denied. Although he characterizes his claim as constitutional, it is not. It is a nonconstitutional sentencing issue that could have been presented to the Court of Appeals had he chosen to appeal his sentence. By failing to appeal, he waived the issue. *See, United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995) ("nonconstitutional sentencing errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of 28 U.S.C. § 2255").

The Court being fully advised,

IT IS HEREBY ORDERED that Petitioner's Section 2255 Motions (Ct. Rec. 249 & 256) are DENIED. The District Court Executive is directed to close the corresponding civil cases: CV-07-0135-FVS and CV-07-0402-FVS.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to Petitioner and to counsel for the government.

DATED this 24th day of November, 2008.

S/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge